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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 510 and 542

ANTHONY GIANFRANCESCO, *Petitioner*,

v.

STATE OF OHIO, *Respondent*.

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner, Anthony Gianfrancesco, respectfully prays that, pursuant to Rule 58.2 and Rule 19.1(a) of the Revised Rules of this Court, a rehearing be granted to the order of this Court, entered in this case on December 7, 1963, denying the two petitions for a writ of certiorari to the Supreme Court of the State of Ohio in the above-captioned cases.

On December 29, 1964, the petitioner presented to Mr. Justice Potter Stewart an application for an extension of time to file a petition for rehearing in these two cases and, on that date, Mr. Justice Stewart granted an extension to and including January 30, 1965.

The petitioner respectfully shows as follows:

Subsequent to this Court's denial of the petition for a writ of certiorari on December 7, 1964, the Supreme

Court of Ohio rendered, on December 23, 1964, a decision which is in point in this case. In *The State of Ohio, Appellee* v. *Bernius, Appellant*, No. 38588, 177 O.S. 155, the Supreme Court reversed the judgment of the trial court, the Common Pleas Court of Hamilton County, and discharged the defendant who had been convicted for possession or control of obscene photographs. Prior to trial, the defendant had filed a motion to suppress those photographs as evidence on the ground that, as stated by the Supreme Court, "they had been found only as the result of an unlawful and unreasonable search." That court held that the trial court "should have granted" the motion, and that "If it had, there would have been no evidence to support a conviction." In so holding, the court stated:

> "The Supreme Court of the United States has held that the Fourteenth Amendment to the Constitution of the United States *now* requires a state court to suppress any evidence, no matter how reliable, acquired as a result of an unreasonable search. This represents a departure from its previous decisions on this precise question. *Wolf* v. *Colorado* (1949), 338 U.S. 25, 93 L.Ed., 1782, 69 S.Ct., 1359. See dissenting opinion, *Mapp* v. *Ohio* (1961), 367 U.S., 643, 672, 6 L.Ed. (2d), 1081, 1100, 81 S.Ct., 1684, 1701. However much the writer may disagree with the most recent holding of the Supreme Court on this question or question its wisdom or soundness (see 50 American Bar Association Journal, 815), we are required to follow it just as we followed its previous holding on the same question. See *State* v. *Mapp*, 170 Ohio St., 427, 166 N.E. (2d), 387."

The Supreme Court of Ohio held that the search of the automobile "cannot be justified as incident to a

lawful arrest. *Preston* v. *United States* (1964), 376 U.S. 364." The Supreme Court also held:

> "Our conclusion is that decisions of the Supreme Court of the United States require this court to hold that, where the owner of an automobile entrusts the possession and control thereof to another, a search thereof with the consent of the one so entrusted but without the express consent or authorization of such owner is, as against such owner, prohibited by the Fourteenth Amendment to the Constitution of the United States as an unreasonable search."

There is no evidence in the record of either of the two principal cases under consideration that the petitioner, who was the owner of the car searched in the two cases, gave "express consent or authorization" for such search. The respondent might endeavor to distinguish the *Bernius* case on the ground that the automobile in that case had been entrusted to the possession and control of another who had been driving the car. It is submitted, however, that the crux of the statement just quoted is that the search was made "without the express consent or authorization" of the owner of the car. It should be noted also that, at the time of the search of the car in the *Bernius* case, the driver was neither in possession nor in control of the car, since the search was made at the police station after the driver had given the keys to the automobile to the police.

The Supreme Court of Ohio pointed out that since the defendant had entrusted the automobile to another person, a Miss Young, "it might reasonably be argued that the defendant had apparently authorized Miss

Young to consent to a search of his automobile." In discarding this argument, that Court stated:

> "However, the opinion of Mr. Justice Stewart in *Stoner* v. *California* (1964), 376 U.S., 483, 11 L.Ed. (2d), 856, 860, 84 S. Ct., 889, 892, clearly indicates that, in providing 'procedural protections * * * to those charged with crime,' a state court can give no consideration to the law of agency as developed by its decisions. Thus, he states:
>
> "' Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority." As this court has said, "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical * * * [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." * * *.' "

With respect to any possible contention by the State that the *Bernius* case should be distinguished because the petitioner, rather than another person, was driving the car, it might also be pointed out that in the case Docket No. 542, the petitioner was not present when his car was searched. Officer Komara, testifying for the State, stated:

> "Q. 'Was Mr. Gianfrancesco *present when his car was searched?*' (emphasis supplied).
> "A. 'No.' " (Record, p. 211).

No number slips were found on the person of the defendant. Officer Kelty, testifying for the State, said:

> "A. 'I learned there was no number slips found on his person.'" (Record, p. 279).

There was not a scintilla of evidence that the petitioner had given any consent or authorization to the police to search his car.

The police had no search warrant in either of the two principal cases.

The State might contend that the search may be justified as an incident to a lawful arrest. It is submitted that there was no lawful arrest in either case. In case Docket No. 542, preparations for the arrest had, as shown by the evidence, been going on for days and the police had plenty of time to obtain a search warrant. Officer Maggianetti, Jr., testifying for the State, said:

> "Q. 'From the 1st to the 5th—from the time you commenced your operation or your surveillance, to the time of the arrest, five days elapsed?'
> "A. 'That's right.'
> "Q. 'At any time during that five days, did you talk to any judge or magistrate about procuring a search warrant?'
> "A. 'No, I didn't.'" (Record, pp. 44-45).

In case Docket No. 510, there is the uncorroborated testimony of a police officer who testified for the State. There was no emergency that had given rise to the policeman's approaching the petitioner's car. If the officer had good reason to do so, it must have been because he had such good reason prior to the officer's stopping his car with a view to approaching the petitioner. In such a case, it is suggested that a warrant

for the arrest as well as search warrant could and should have been obtained. There was no proof that any activity indicating the writing of numbers or any emergency prevented the obtaining of a warrant.

With all due respect to the opinion of the Supreme Court of Ohio, it is submitted that it does not reflect or resolve the question of illegal search settled by the Supreme Court in the *Mapp* case in the light of the facts of the two principal cases nor does any decision of the lower court reveal any reflection or consideration of this decision.

It is submitted that this Court should not permit circumvention of the *Mapp* case by the methods pursued by the police in those two cases and should thus prevent the provisions of the Fourth Amendment from being "eroded."

In its Brief in case No. 510, p. 6, the respondent endeavors to distinguish that case from the *Mapp* case on the ground that, in the latter, "there was an unlawful arrest and search made" while, in the former, a police officer, Zins, "saw the numbers slips and there slips were *handed* to the officer by Petitioner." Zins was *the only* police officer who was *at the car* when, according to his testimony, he *saw* the slips and was handed them by the defendant. As no other person was there at the time *his* testimony is, of course, uncorroborated. There is an implied but nevertheless discrediting contradiction of this testimony—the only one as to any pertinent voluntary action on the part of the petitioner in either case—in the respondent's Brief itself. On page 4 thereof, it is stated: "Before Gianfrancesco got out of the car he *attempted to stuff* some rundown sheets and numbers slips between the crack of

the front seat of the automobile." (Emphasis supplied). Does it stand the test of logic to contend that a man who "*attempted*" to hide numbers slips from a police officer, would have; *just moments before* such attempt, *voluntarily handed* slips to the same police officer from whom he "attempted" to hide them? Does it stand the test of logic to contend that such a person, one who has already "*voluntarily handed*" numbers slips to a police officer would—after the milk had already been spilled by such handing of self-incriminating evidence—"attempt" to hide from the same officer numbers slips a moment later?

It is respectfully submitted that to permit the illegal search and arrest without either an arrest or a search warrant in these two cases, in the above quoted words of this Court quoted by Mr. Justice Stewart "would not comport with our justly proud claim of the procedural protections accorded to those charged with crime."

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of the State of Ohio.

Respectfully submitted,

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Certificate of Counsel

Pursuant to Rule 58.1 of the Revised Rules of this Court, I, the undersigned, John Maktos, counsel for petitioner, Anthony Gianfrancesco, in the above-captioned case, certify that this petition for rehearing is presented to this Court in good faith and not for purposes of delay.

JOHN MAKTOS,
Counsel for Petitioner.